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In the Supreme Court of the United States
October Term, 1995

SHELDON FUTERNICK, d/b/a
HOLIDAY WEST MOBILE HOME PARK
and d/b/a HOLIDAY WOODS MOBILE
HOME PARK,

Petitioner,

v.

JON CATERINO; ROLAND HARMES,
Director, Michigan Department of Natural Resources;
and VERNICE DAVIS-ANTHONY, Director
Michigan Department of Public Health,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS CATERINO, HARMES AND DAVIS-ANTHONY IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the complaint state a legally sufficient cause of action for selective enforcement despite its failure to allege race, religion, or other arbitrary classification?

a. Does the narrowly circumscribed definition of selective enforcement approved by this court in *Oyler v. Boles* prohibit an enforcement action that is based upon "forbidden aims," other than denial of a constitutional right or invidious discrimination?

b. Are "bad faith," "animosity" or "malice" forbidden aims for issuing a certificate of noncompliance to a violator of a valid waste-water discharge permit, where there are no allegations of intent to harm a protected group or punish a person for the exercise of a constitutionally protected right?

II.

Is lawful issuance of a Certificate of Noncompliance for Petitioner's failure to meet the terms of a valid surface waste water discharge permit objectively reasonable conduct entitled to qualified immunity, or did issuance of the certificate violate a constitutional right that was clearly defined at the time the act occurred?

III.

Does the Eleventh Amendment permit prospective injunctive relief against directors of State agencies in their official capacities absent allegations that the directors themselves are personally violating federal law or that such violations are the result of agency policy or custom?

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JURISDICTION

Respondents believe the federal courts have no subject matter jurisdiction over the claims against the State agencies and their directors. Eleventh Amendment immunity is a bar to suit which deprives the federal courts of jurisdiction. Without a finding of jurisdiction, a federal court is powerless to proceed. *Ex Parte McCardle*, 74 U.S. (7 Wall) 506 (1868); *Memphis American Fed. of Teachers v. Bd. of Ed. of Memphis*, 534 F.2d 699 (6th Cir. 1976). Therefore, the district court lacked subject matter jurisdiction of the claims against the State agencies and their directors.

COUNTERSTATEMENT OF THE CASE

1. Counterstatement of the Proceedings

The complaint in this case was filed in the United States District Court for the Eastern District of Michigan on March 9, 1993 against Sumpter Township in Michigan and six of its officers, administrators and board of trustees (the Township defendants). The complaint also named the Michigan Mobile Home Commission (MMHC); the Michigan Department of Natural Resources (MDNR) and its director, Roland Harmes; the Michigan Department of Public Health (MDPH) and its director, Vernice Davis-Anthony; and Jon Caterino (collectively referred to as the State Respondents). At that time Mr. Caterino was an MDPH employee in the Engineering and Environmental Services Section. He, MDPH and Davis-Anthony are referred to herein as the Public Health Respondents. MMHC, MDNR and director Roland Harmes are referred to herein as the Natural Resources Respondents.

The complaint attempted to state a selective enforcement cause of action under the Equal Protection Clause against all Respondents, for unequal and discriminatory administration of the law. (Complaint, ¶ 48, R 1). The complaint did not contain the "malice" and "bad faith" allegations which Petitioner raised for the first time in the Court of Appeals. See Argument 5, pp 16-18, *infra*. All the State Respondents except Mr. Caterino were sued in their official capacities for injunctive relief. Mr. Caterino is the

single State Respondent sued not only in his official capacity but also in his personal capacity for both injunctive relief and money damages.

The Public Health Respondents filed a motion to dismiss (R 5) on March 31, 1993, which was followed by a motion to dismiss the Natural Resources Respondents on April 5, 1993 (R 9). In response to the motions, Petitioner filed only a short brief unsupported by any factual matter (R 27). Oral argument was heard April 28, 1993 (R 33), but a decision was not rendered until eleven months later (R 42). During the intervening eleven months the district court conducted many settlement conferences which primarily involved Petitioner and the Township defendants.

At a Status Conference on February 1, 1994, a deadline of March 15, 1994 was set by the district court for any settlement to be finalized, after which the motions would be decided absent a settlement. At that time Petitioner sought permission from the Court to file "supplemental information of a factual nature," which was permitted to be completed by March 1, 1994 absent a settlement. On that date, Petitioner filed another brief 26 pages in length (R 36) supported by a three-ring binder of documents that looked to be about 500 pages thick (R 37).

The State Respondents' response was confined primarily to the non-factual nature of the motions to dismiss, because the time allotted for a response to Petitioner's "supplemental information of a factual nature" turned out to be wholly inadequate in light of the very large number of documents and huge amount of material filed by Petitioner with no warning to either the district court or State Respondents of the magnitude of the filing that they were contemplating. However, Respondent Caterino attached an affidavit in Appendix A to the State Respondents' district court supplemental brief (R 40) describing the actions he took, the reasons for them, and an explanation why he believes there was no purposeful discrimination.

After passage of nearly 14 months from the time the Public Health Respondents' motion to dismiss was filed--during which time the district court made a very concerted

effort to obtain a settlement of benefit to Petitioner--the Court finally issued its Order Granting Defendants' Motions to Dismiss (R 42) and Order of Dismissal (R 41), both dated May 27, 1994. The district court held that (1) Petitioner failed to state a claim against Respondent Caterino, (2) the claim against Respondent Caterino was barred by qualified immunity, and (3) the claim against all other State Respondents was barred by Eleventh Amendment immunity.

Thereafter, further motions and briefs were filed and orders issued that did not involve the State Respondents. An appeal to the United States Court of Appeals for the Sixth Circuit followed on August 8, 1994. From then until just shortly before Petitioner's brief on appeal was filed, the Court of Appeals also conducted and/or supervised numerous discussions involving primarily Petitioner and the Natural Resources Respondents to obtain a settlement of benefit to Petitioner. Despite the best efforts of both courts, Petitioner has been unable to resolve his differences with any of the State Respondents.

In an opinion issued March 13, 1996, the Court of Appeals reversed the district court's finding of Eleventh Amendment immunity and held that (1) Petitioner failed to state a claim against all State Respondents, and (2) the claim against Respondent Caterino was barred by qualified immunity. Petitioner's motion for rehearing and suggestion for rehearing *en banc* was denied April 26, 1996, the Sixth Circuit issued its Judgment on May 6, 1996, and Petitioner sought a Writ of Certiorari from this Court July 18, 1996.

2. Counterstatement of Facts.

Petitioner's entire factual claim is a fragile web of speculation, suspicion and innuendo, despite his extensive use of discovery and burdensome requests for documents under the state's Freedom of Information Act. Even with unlimited opportunity to make his case, Petitioner has failed to demonstrate that Jon Caterino--who was merely performing his duty of monitoring compliance with lawful MDNR permit provisions--did anything that can be characterized as wrongful or unlawful. Only his state of mind is alleged to have been impure under the United States Constitution.

Respondents adopt for purposes of this Court's review the statement of facts in part I of the Court of Appeals opinion in this case. (Petitioner's appendix, pp 2- 7). While Respondent Caterino does not agree with absolutely everything appearing therein, he has no disagreements that are of significance to this appeal. The only matter of importance not mentioned by the Court of Appeals is that Mr. Caterino did not even know Petitioner Sheldon Futernick (Caterino affidavit, ¶ 5; R 40), and the only "animosity" (if it can even be called that) pointed to by Petitioner (Petitioner's Court of Appeals Supplemental Brief, p 7; R 36) was directed at Irvin Futernick, Petitioner's son. This "animosity" consisted of some idle talk, prior to the beginning of a meeting, to the effect that Irwin was a difficult individual to work with and made Mr. Caterino's blood pressure rise. Nothing was said to indicate the existence of any "animosity" toward Petitioner. (Respondent Caterino's Court of Appeals Brief on Appeal, Appendices B, D and E).

REASONS FOR DENYING THE PETITION

1. There Is No Selective Enforcement Cause Of Action For "Improper Motive," And The Court Of Appeals Correctly Rejected Petitioner's Invitation To Expand Unrecognizably This Court's Own Limitations On The Definition Of Selective Enforcement.

In the introduction portion of his Statement of the Case, Petitioner injects legal argument into his factual statement and misleads this Court in the process by mischaracterizing the Court of Appeals' opinion and the parameters of his cause of action. There, Petitioner accuses the Court of Appeals of "narrowing the breadth of the Equal Protection Clause," and undermining "the fundamental fairness that the Equal Protection Clause was designed to promote," without citing "a single decision endorsing the narrow scope it assigns to the Equal Protection Clause." (Petition for Certiorari, p 2). The Court of Appeals' opinion is so characterized because it rejected Petitioner's selective enforcement cause of action "absent an allegation that claimant was targeted because of his or her membership in a 'protected group' or because of his or her exercise of a

constitutional right." (*Id.*) The essence of Petitioner's argument is that *fundamental* fairness requires he not be required to plead violation of any *fundamental* right except the Equal Protection Clause. Aside from the self-contradictory nature of his argument, Petitioner inaccurately describes both the thoughtful and well-supported Court of Appeals' opinion and the limited nature of the selective enforcement cause of action approved by this Court.

The genesis of a selective enforcement cause of action under the Equal Protection Clause was this Court's opinion in *Oyler v. Boles*, 368 U.S. 448 (1962), which made "race, religion or other arbitrary classification" a required element. 368 U.S. at 506. In *Boles*, this Court approved a definition for selective enforcement that is deliberately based on a suspect classification. The terminology "race, religion or other arbitrary classification" presupposes a class based claim.

The facts in *Boles* involved allegations by two criminal defendants that they had been denied equal protection because the West Virginia habitual criminal statute had been applied to only a minority of those subject to its provisions, which included them. Statistics showed that a high percentage of those subject to the law had not been proceeded against. This Court held that "[e]ven though the statistics in this case might imply selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456. Thus, this Court approved a definition of selective enforcement that could be used *only* when invidious discrimination or other suspect classification is present.

In contrast, the Court of Appeals has permitted a selective enforcement cause of action when a suspect classification appears, or when selective enforcement occurs in retaliation for the exercise of a fundamental constitutional right. Quoting from *Boles, supra*, a panel of the Court of Appeals in *U.S. v. Hazel*, 696 F.2d 473 (6th Cir. 1982), stated at 474:

> [It] has been held that a defendant asserting selective prosecution: '. . . bears the heavy burden of establishing, at least prima facie, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights.'

In *Hazel*, the Court of Appeals approved a broader cause of action than the one approved in *Boles* which required a suspect classification. *Hazel* extended equal protection guarantees to all those cases where there is intent to prevent the exercise of an underlying fundamental constitutional right, whether invoking a suspect classification or not.

The Court of Appeals' opinion in the instant case relies upon both *Boles* and *Hazel* as well as numerous other decisions of this Court. (Petitioner's appendix, pp 12-14). Moreover, the Court of Appeals in this case cited several other Circuits that did not mention improper motive as a *prima facie* case for selective enforcement. (Petitioner's appendix, pp 16-17, n 11). Therefore, when Petitioner criticizes the Court of Appeals for not citing "a single decision endorsing" its holding, he is clearly overstating the case. Likewise, when he describes the Court of Appeals' opinion as "narrowing the breadth of the Equal Protection Clause," he similarly misrepresents the limited definition of selective enforcement circumscribed by this Court in *Boles*. Instead, in reliance upon *Hazel* the Court of Appeals opinion in this case actually expands this Court's definition of selective enforcement, but finds that Petitioner does not fit within even that expanded definition of his cause of action.

Regardless of which interpretation of this cause of action is used--the more stringent *Boles* or the more liberal *Hazel* criteria--Petitioner has not alleged that he was prevented from exercising a fundamental constitutional right.

This is not a case where Petitioner was prevented from exercising the right of free speech or assembly, for example, as a result of the alleged unequal enforcement. Rather, he was prevented from continuing to violate the wastewater surface discharge permit. This is not the kind of conduct the equal protection selective enforcement cause of action was intended to protect. Petitioner does not have a fundamental constitutional right to violate the law.

Absent a suspect classification under *Boles*, or at least suppression of a fundamental constitutional right under *Hazel*, there can be no selective enforcement violation of the Equal Protection Clause even under the more liberal standard utilized by the Court of Appeals in this case. "[T]he abuse charged in this case [enforcement with impure thoughts but no suspect classification or fundamental right involved] is remote from the primary concern of the framers of the equal protection clause." *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). Accordingly, the Court of Appeals was certainly correct in rejecting Petitioner's boundless interpretation, which would transform the selective enforcement cause of action into some kind of federal intentional tort under the Equal Protection Clause.

2. Creation At This Time Of A Constitutional Cause Of Action For Improper Motive Will Not Change The Judgment For Respondent Caterino.

Even if this Court is inclined to expand the *Boles* definition of selective enforcement beyond what the Court of Appeals did in *Hazel*, that would not change the result as to Respondent Caterino, because he has qualified immunity. The district court held that Mr. Caterino was shielded from liability, because "his action was objectively reasonable" and "did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Petitioner's appendix, p 29). However, Petitioner thinks the Court of Appeals "did not address the qualified immunity issue." (Petition for Certiorari, p 9, n 4). Clearly, that is not an accurate assessment because the court explicitly "addressed" the issue in its opinion. (Petitioner's appendix p 11, n 6). Indeed, it seems to Respondents that

the Court of Appeals affirmed the district court holding when it held that Mr. Caterino had violated no constitutional right. (Petitioner's Appendix, p 21). Yet Petitioner has not asked this Court to review the qualified immunity issue.

In any event, from the discussion in part one above, it is absolutely clear that no constitutional right of the nature claimed by Petitioner existed under the *Boles* decision of this Court or pre-existing decisions of the Court of Appeals. Indeed, the Court of Appeals' opinion now under appeal stated, "This Circuit has not squarely addressed the question of what aims are forbidden ones for the purposes of a selective enforcement action . . ." or whether "an allegation of malice is sufficient . . . ." (Petitioner's appendix, pp 13, 14-15). Obviously, neither the Court of Appeals nor this Court have accepted a selective enforcement cause of action for improper motive. Because neither this Court nor the Court of Appeals had clearly delineated the cause of action asserted here by the time Respondent Caterino acted, he would still have qualified immunity even if this Court were to grant certiorari and ultimately adopt Petitioner's request to expand the *Boles* definition. *See, inter alia, Seigert v. Gilley*, 500 U.S. 226, 231 (1991), which requires that the constitutional right be *"clearly established at the time the action occurred"* (Emphasis supplied) before the defense of qualified immunity can be surmounted. Here, the constitutional "right" to be free from selective enforcement motivated by bad faith or malice does not yet exist, so Mr. Caterino cannot be liable for violating such a "right."

Indeed, in *Seigert, supra*, this Court reviewed a claim that the defendant federal employee had deprived plaintiff of a "liberty" interest by allegedly writing an adverse employment recommendation "with bad faith and malice." (*Id.*, pp 230, 232). This Court held that plaintiff had "failed not only to allege the violation of a constitutional right that was clearly established at the time of [defendant's] . . . actions, *but also to establish the violation of any constitutional right at all.*" (*Id.*, p 233) (Emphasis supplied). In *Seigert*, this Court found that official action motivated by malice and bad faith did not violate the constitution *and* did not

overcome qualified immunity. The same is true here; Petitioner has not stated a cause of action for selective enforcement *and* has not alleged violation of a clearly established constitutional right. As a result, qualified immunity will dictate the same result in this case, even if this Court grants certiorari and creates new rights.

3. Separate Grounds Support The Judgment Of The Court Of Appeals For The State Department Directors.

As noted in part two above, creating new constitutional rights will not change the result as to Respondent Caterino, because he is protected by qualified immunity. Similarly, the relief Petitioner seeks will not change the judgment granted to the State department directors either, because they are protected by Eleventh Amendment immunity.

In the district court, Petitioner purported to invoke the "long-standing rule that a State Official can be sued for prospective equitable relief in his or her official capacity." (Petitioner's District Court Brief in Response to Motions to Dismiss, p 3; R 21). On the contrary, the long-standing rule holds that official-capacity actions are generally barred by the Eleventh Amendment, because they are in fact against the State. In *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1983), this Court held that the Eleventh Amendment is a jurisdictional bar to any kind of relief, legal or equitable, against State agencies. Petitioner finally conceded this at the district court level.

However, analysis of the Eleventh Amendment in this case cannot go forward without reference to another well-established rule that "even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945). *See also, Hazard v. Weinberger*, 382 F. Supp. 225 (1974) (in which it was held that the State of New York, its officials, and particularly the Bureau of Workers' Compensation were immune from a civil tort suit under the concept of sovereign immunity pursuant

to the Eleventh Amendment); *Mt. City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977); *Alabama v. Pugh*, 438 U.S. 781 (1978); and *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

For example, State officials sued in their official capacities also share Eleventh Amendment immunity:

> The Eleventh Amendment bars a suit against state officials when the state is the real, substantial, party in interest. *Ford Motor, supra.*
>
> Thus, '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' [citation omitted] And, as when the State itself is named, a suit against state officials that is in fact a suit against the State is barred regardless of whether it seeks damages or injunctive relief.

465 U.S. at 101. Here, Ms. Davis-Anthony and Mr. Harmes were named nominally in the complaint and the decree would operate against the State. In fact, the equitable relief sought in the complaint is sought expressly against "MDPH" and "MDNR," not the directors. Therefore, the directors are also protected by the Eleventh Amendment from suits such as this for equitable relief or monetary damages.

No case makes this more clear than *Hafer v. Melo*, 502 U.S. 21, 26 (1991), cited by Petitioner to the district court. *Hafer* states:

> Although 'state officials literally are persons,' an official-capacity suit against a state officer 'is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the state.'

Any suit against the State, including an official capacity suit against a State official for prospective relief, is barred by the Eleventh Amendment, unless it falls within the *Ex Parte Young* exception permitting prospective injunctive relief against ongoing unconstitutional conduct of the official.

Petitioner asked the Court of Appeals to broaden this exception to permit prospective equitable relief against a State official in his or her official capacity, on grounds of *respondeat superior*, even though that official has not herself acted unconstitutionally or participated in the alleged unconstitutional conduct in any way whatsoever. The Court of Appeals accepted Petitioner's argument. However, this interpretation exceeds the *Ex Parte Young* exception to Eleventh Amendment immunity.

Ex Parte Young, 209 U.S. 123 (1908), carved out an exception permitting prospective injunctive relief against a State official enforcing an unconstitutional State statute. Thereafter, this exception was expanded somewhat to permit prospective injunctive relief against any unconstitutional conduct by a State official whether pursuant to a State statute or not. *See, e.g., Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1983). However, the *Ex Parte Young* exception has never been expanded by this court to permit prospective injunctive relief against a State official who has not engaged in unconstitutional conduct in some way.

The *Ex Parte Young* exception was accomplished by the fiction that the *individual* and not the State was being sued:

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity . . . . [T]he officer . . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of *his individual conduct*.

209 U.S. at 159-160. (Emphasis supplied). Thus, the *Ex Parte Young* exception is based on the pre-existence of unconstitutional conduct *by the individual*. If there is no unconstitutional conduct *by the individual* sued, the exception is unsupported and inapplicable.

Plaintiffs in federal court simply may not bind a State by prospective relief through an official-capacity suit. They can only bind an individual State official who is accused of unconstitutional conduct. Here, that State employee whose conduct is at issue is also being sued in his personal capacity for injunctive relief and money damages. Because an injunction is available as to him, there is no reason to issue an injunction against Ms. Davis-Anthony or Mr. Harmes, especially since there is no allegation in this case of an unconstitutional policy or custom that would require such an injunction. Therefore, the department directors are protected by the Eleventh Amendment because this is an official-capacity suit against their State offices, they are not accused as individuals of unconstitutional conduct, and they are not stripped of their official character by the *Ex Parte Young* exception.

Petitioner's claim to the contrary in the court below was based upon *Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989); *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); and *Harrington v. Grayson*, 764 F. Supp. 464 (1991). However, the *Will*, *Graham*, *Hoptowit*, *Adams* and *Harrington* cases are all consistent with Respondents' argument here. When an unconstitutional policy or custom is in place, the official himself or herself is a participant in the unconstitutional conduct, is stripped of official status under *Ex Parte Young*, and may be enjoined as an individual, but unconstitutional policy or custom is not alleged in this case.

This case is nearer the facts in *Rizzo v. Goode*, 423 U.S. 362 (1976), which rejected equitable relief under 42 U.S.C. §1983, *inter alia*, because of the absence of personal involvement by supervisory personnel in unconstitutional conduct of various police officers. The plaintiffs in *Rizzo* sought an injunction against supervisory officials who had not engaged in unconstitutional conduct. Distinguishing those cases in which the officials had participated individually, this Court reversed the court of appeals and district court who had permitted the injunction against State officials without a showing of direct responsibility. *See also*, *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988)

(supervisory official's failure to supervise, control or train the offending individual is not actionable, unless the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it.").

The same result is appropriate here, because Ms. Davis-Anthony and Mr. Harmes are not alleged to have participated in any way whatsoever in any allegedly unconstitutional conduct. Petitioner has made no allegation that the State agencies have an institutional policy or custom permitting or accepting selective enforcement or any other constitutional violation, so it cannot be said that Ms. Davis-Anthony or Mr. Harmes is even indirectly responsible.

4. There Is No Irreconcilable Or Intolerable Conflict Between Court Of Appeals Opinions.

Petitioner has tried to persuade this Court to review this case because of an alleged conflict between the opinion under review and opinions in other Circuits, as well as another opinion of the Court of Appeals for the Sixth Circuit. However, the opinions relied upon by Petitioner present mere inconsistency in dicta or in general principles, but do not create a "real," "true," "direct," or "irreconcilable" conflict (R. Stern, et. al. *Supreme Court Practice*, 7th ed., 167-168 (1993))--and certainly not an "intolerable" conflict (S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 617 (1984))--demanding this Court's review. In fact, there are so few selective enforcement cases addressing the improper motive issue that this Court has reasonable justification for awaiting further development of the issue by the lower courts. *See e.g.*, Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 230, 233 (1983); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J) and *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J).

a. There Is No Conflict Between Opinions Of The Court Of Appeals For The Sixth Circuit.

Petitioner claims a conflict between the opinion in this case and the language in *Wright v. Metro Health Medical Center*, 58 F.3d 1130, 1137, n 7 (6th Cir. 1995). This contention was disposed of by the Court of Appeals' opinion here: "In *Wright*, however, the issue of selective enforcement was not addressed because the plaintiff did not raise it below, and because the plaintiff made *no* allegation as to the defendant's intent." Therefore, the *Wright* opinion cannot legitimately be said to conflict with the opinion in this case.

b. There Is No True Or Direct Conflict Between This Opinion And Those Of Other Circuits.

Petitioner relies upon five Court of Appeals opinions to support his claim of conflict. The first is *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and another is *Smith v. Eastern New Mexico Medical Center*, 72 F.3d 138; 1995 WL 749712 (10th Cir. December 19, 1995), which relies upon *Esmail*. However, *Esmail* does not conflict with this case because the facts are so dissimilar.

Here, Respondent Caterino's enforcement action of issuing a notice of non-compliance was entirely consistent with and based upon the valid provisions of a surface wastewater discharge permit that Petitioner indisputably had not complied with. Moreover, Mr. Caterino's decision was only the first step in an administrative process--the result of which is appealable to court--that includes evidentiary hearings, where Mr. Caterino's actions would be reviewed and his decision could easily be changed by either the MDNR or the MMHC. In contrast, *Esmail* involved "an orchestrated campaign of official harassment directed against . . . [the plaintiff] out of sheer malice." 53 F.3d at 179. "[T]he unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor" who "harbors a malignant animosity toward him." (*Id.*) The *Esmail* opinion states the Equal Protection Clause can be "a

kind of last-ditch protection against governmental action *wholly impossible to relate to legitimate government objectives."* (*Id.* at 180) (Emphasis supplied). The facts in that case are so different from the facts in the instant case--where Mr. Caterino's actions served only to begin an administrative review process--that a real conflict does not exist between *Esmail* or *Smith.*

Moreover, *Smith* is an unpublished opinion that--in addition to being heavily reliant on *Esmail*--is also characterized by allegations indicating that defendant exercised unfettered discretion to "oppress" the plaintiff. (Slip opinion, pp 8-9). Likewise, *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), also relied upon by Petitioner, is dependent upon allegations of "unlawful oppression" (156 F.2d at 793) that have never been made here. Instead, aside from the claims of improper motive made for the first time on appeal, Mr. Caterino is not charged with unlawful or oppressive conduct.

Another of Petitioner's cases, *Batra v. Bd. of Regents of Univ. of Nebraska*, 79 F.3d 717 (8th Cir. 1996), does not present a real conflict because the plaintiffs in that case claimed to be part of a protected class (*Id.* at 719), which Petitioner in this case does not. Additionally, *Batra* required *"unlawful* intent to discriminate against plaintiff *for an invalid reason."* (*Id.* at 721) (Emphasis supplied). As noted above, if not for the claim of improper motive made on appeal, Mr. Caterino's actions were otherwise lawful, and were taken for valid reasons, clearly related to legitimate government objectives.

Petitioner's remaining cases from the First and Second Circuits were dealt with in the Court of Appeals' opinion under appeal. The Court of Appeals found it "unwise to adopt the often-stated, but never-used rule of the First and Second Circuits." (Petitioner's appendix, p 16). Examining a number of cases from the Courts of Appeals for the First and Second Circuits, the Court of Appeals in this case found that, while these other Circuit Courts said they will allow relief for malice in selective enforcement, neither "has ever affirmed a victory for plaintiff on such a theory." (*Id.* at 15).

Thus, the incongruity among these opinions that Petitioner cites appears, upon closer examination, to be more imaginary than real, and more of an inconsistency in dicta or disagreement over general principles than true, direct, irreconcilable conflict. Accordingly, the state of the case law in the various Circuits relied upon by Petitioner does not demand this Court's review.

5. The Issue Of Improper Motive Was Not Raised In The District Court.

The Court of Appeals' opinion correctly notes the lack of any allegation of impermissible intent in the complaint upon which the district court ruled. (Petitioner's appendix, pp 14-15, n 9). But the Court of Appeals incorrectly suggests "malice" and "bad faith" appeared in the district court briefs and arguments. (*Id.*) On the contrary, the term "bad faith" used to describe Mr. Caterino's motive did not appear in Petitioner's argument until his appellate lawyers apparently deemed it necessary for their success under the bad faith criterion of *Hazel, supra*, and that term was then placed in Petitioner's Brief on Appeal to the Court of Appeals for the first time. The word "malice" did not appear to describe Mr. Caterino's motive until it was used for the first time for that purpose in the Petition for Rehearing and Suggestion for Rehearing En Banc in the Court of Appeals, presumably to take advantage of the authority now being cited. Indeed, on page 7 of his district court Brief in Response to Motion to Dismiss (R 21), Petitioner wrote, "the facts upon which Futernick relies do not even involve subjective intent or motivation . . . ."

In the complaint (R 1), the only allegations against Mr. Caterino were that the failure of MDNR, Mr. Caterino and the MDPH to enforce against other mobile home parks was a result of purposeful and intentional discrimination against Petitioner, which allegedly constituted unequal and discriminatory administration of the law (¶ 48). This was the allegation being made at the time the State Respondents' motions were filed.

In his district court brief for injunctive relief (R 17), Petitioner for the first time made allegations, not specifically

naming Mr. Caterino, that "state officials got together with Sumpter Township to coerce . . . [Petitioner] into making financial contributions toward construction of the Sumpter Township sewer system." (Petitioner's District Court Preliminary Injunction Brief, pp 16-17; R 17). The severity of the allegations made were thus raised a level in a brief without the citation of any supporting evidence or amendment of the complaint. Moreover, the level of severity was raised another notch during oral argument at the hearing conducted by the district court on April 28, 1993 (R 33), where Petitioner labeled the alleged conduct as a conspiracy to deprive him of money. (Transcript of April 28, 1993 District Court hearing, pp 21-22). In his third brief to the district court (R 36) on these issues, Petitioner raised the level of rhetoric even higher (still with no evidence that supported such conclusions or any amendment to the Complaint) by charging Mr. Caterino alone with (1) "conspiracy and collusion with Sumpter Township and its officials to extract money from Futernick under the guise of--and utilizing the threat of--regulatory action," and (2) "vastly disparate regulatory treatment over the years." (Petitioner's Court of Appeals Supplemental Brief, p 1; R 36). Still, there was no use of the terms "malice" or "bad faith" by Petitioner.

In the Court of Appeals Petitioner's factual allegations metamorphosed into a claim that State officials (not specifically naming Mr. Caterino) violated Petitioner's constitutional rights "when they subjected him to stringent permit requirements while leaving other mobile home parks in the area unmolested, because this disparate treatment was motivated by a bad faith purpose either arising out of personal animus or intent to collude with the township in an attempt to exclude him from the sewer system." (Petitioner's Court of Appeals Brief on Appeal, pp 16-17). As to Mr. Caterino, Petitioner then stated "the evidence is overwhelming that Caterino's selective enforcement was motivated by *bad faith* based on either personal animus or his intent to collude with the township in its efforts to exclude Mr. Futernick's parks from the sewer system." (*Id.*, p 47.) (Emphasis supplied). So "bad faith" surfaces for the first time in Petitioner's appellate brief, but there is still no use of the term malice.

Allegations of "malice" did not appear until the Petition for Rehearing in the Court of Appeals and the Petition for Certiorari filed with this Court. Now the allegations have risen and transmogrified from the relatively benign recitation contained in the complaint to the emotion-filled claims of animus or bad faith appearing for the first time in Petitioner's Court of Appeals brief and the exaggerated claims of malice deemed necessary by Petitioner's appellate lawyers to make his claims fit the new case law they cite here. This change in the charges and Petitioner's tone has all occurred without any amendment to the complaint or any real change in the underlying factual allegations.

Mr. Caterino is still accused, as he was in the complaint, of not having accepted Irwin Futernick's version of the arrangement with the township for sewers, and to have insisted on hearing these assurances himself. His insistence was actually provident, because it turned out that Petitioner's son, Irwin, had no agreement of substance with either MDNR or Sumpter Township. Mr. Caterino's persistence and subsequent issuance of a Certificate of Non-compliance, after the vaporous nature of Irwin's assurance was revealed, is conduct to be commended in a public official, not conduct to be disparaged.

This is the conduct that Mr. Caterino has been charged with from the beginning. Petitioner's appellate lawyers now attribute different motives to Mr. Caterino's actions, but the basic conduct remains unchanged. This is not unconstitutional conduct; enforcement of valid permit provisions several months after violations began does not trample on any known constitutional right, regardless of motive.

6. The Issue Of Improper Motive Does Not Constitute A Question Of Wide Constitutional Importance.

The Court of Appeals opinion observes that improper motive for enforcing state law is not the kind of issue that the constitution was designed to prevent. "[We] see compelling reasons that the sundry motivations of local regulators should *not* be policed by the Equal Protection

Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right." (Petitioner's appendix, p 17). One of the reasons for not accepting Petitioner's invitation to further expand the selective enforcement cause of action was that "we federalize and constitutionalize what are essentially issues of local law and policy." (*Id.*, pp 18-19). Thus, the Court of Appeals recognized that the remedy for Petitioner's claim, if any is needed, must be found under State law.

a. State Tort Laws And Hearing Procedures Provide Adequate Remedies, If Any Are Needed, For State Action Allegedly Based Upon Improper Motive.

The Court of Appeals observed that "[r]egulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law," but accepted the proposition that "the states themselves are vibrant defenders of this tradition." (*Id.*, p 19). The States may be trusted to police adequately their own processes. As a low level State employee, Respondent Caterino is not in a position to "overawe" (Petition for Certiorari, p 18) State court judges. He is not a powerful State official, but only a district engineer trying to do his job as he sees it. Indeed, the Court of Appeals noted that Petitioner has recourse through State political processes, State courts on State constitutional grounds, or State courts on federal due process grounds ultimately reviewable by this Court. To this list of possible State remedies can be added State tort law and hearing procedures. If States, through their courts, see abuse of official authority as a problem needing a solution, State tort remedies can be adopted by common law or statutory provisions. Moreover, as noted in part 4b above, either MDNR or MMHC can refuse to proceed against Petitioner if they view Mr. Caterino's actions as inappropriate. There is no need to expand the existing federal selective enforcement remedy to address the "sundry motivations" of State regulators.

b. The Improper Motive Alleged In This Case Is Non-Recurring And Of A Unique Factual Nature With No Significant Public Impact.

As noted in part three above, there are no allegations in this case of a State policy or custom that suggests a broad design or widespread failure to police selective enforcement within the State departments. Rather, the allegation is that Respondent Caterino personally dislikes Petitioner. As noted in the above Statement of Facts, Mr. Caterino does not even know Petitioner, so he cannot by definition have any animosity toward him. Be that as it may, the point is that the issue of Mr. Caterino's animosity for Petitioner, or that of any given State regulator, is not a matter of grave public importance, does not have significant public impact, and does not implicate national constitutional concerns. "The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious." (Petitioner's appendix, p 19). Here, no such concerns attend the allegations, and this case is not worthy of review at this level.

CONCLUSION

For the above reasons, the Petition for Certiorari should be denied, and the Court of Appeals' refusal to expand further this Court's narrowly circumscribed definition of the selective enforcement cause of action should stand unchanged.

Respectfully submitted,

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